

**JACK BRANSTETTER**  
Claimant

**DUSTROL, INC.**

AND

**ST. PAUL FIRE & MARINE INS. CO.**  
Insurance Carrier

A preliminary hearing order is subject to review by the Appeals Board, when the issue of whether claimant's accidental injury arose out of and in the course of his employment is raised. See K.S.A. 44-534a, as amended.

(1) Claimant severely lacerated and fractured his left thumb on March 4, 1997, while drilling a hole in a piece of sheet metal during regular work hours on the premises of the respondent. Claimant alleges and testified that the piece of sheet metal was being made to use as a hose clamp for a water hose located on respondent's heater trucks and used to put out fires.

Respondent challenges claimant's allegation and contends the piece of sheet metal claimant was drilling, at the time of his accident, was not a hose clamp but was a brace to repair a glider located at claimant's home. The respondent argues that their employees are not authorized to use respondent's machinery to repair or make any personal item at any time while they are working for the respondent. Therefore, respondent contends claimant's accidental injury did not arise out of his employment because claimant was injured making a part for his personal use and not for the benefit of the respondent.

The Administrative Law Judge found the respondent permitted claimant to work on respondent's projects of claimant's choice between job assignments. The Administrative Law Judge concluded, at the time of the injury, claimant was working on a project for the respondent, i.e., making a bracket to hold water hoses in place on a heater truck. Furthermore, the Administrative Law Judge concluded the respondent had no direct evidence to support its argument that claimant was working on a home project when injured.

The preliminary hearing record makes it clear the claimant injured his left thumb while he was at work in the employer's service. Therefore, the Appeals Board finds claimant's accidental injury occurred in the course of his employment with the respondent. See Siebert v. Hoch, 199 Kan. 299, Syl. ¶ 1, 428 P.2d 825 (1967).

The determinative issue in this case is whether the piece of sheet metal claimant was drilling, at the time of his injury, was a part being made for respondent's heater truck or was the part being made for claimant's glider. If the piece of sheet metal was for claimant's heater truck and not his glider then claimant's lacerated left thumb injury arose out of employment with the respondent. An injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of employment. See Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 4, 899 P.2d 1058 (1995).

Claimant testified he was drilling a hole in the end of the sheet metal when it caught in the drill, twisted, and severely lacerated his left thumb. Claimant admitted he had a glider at home that had a brace broken but denied the piece of metal he was drilling, at the time of his accident, was to replace the glider brace. Claimant pointed out during his testimony the holes that were drilled in the sheet metal strip, admitted as respondent's Exhibit 1, at the preliminary hearing, were substantially larger than the holes in the glider brace. One of the glider braces was also admitted into evidence at the preliminary hearing. Claimant described how the piece of sheet metal he was drilling at the time of his injury was to be utilized as a hose clamp by mounting it to square tubing that would be flexible enough to bend around and hold the water hose in place.

The respondent had two representatives testify at the preliminary hearing, Calvin Templeton, claimant's supervisor, and Ronald Wilson, area manager for the respondent.

Both Mr. Templeton and Mr. Wilson testified that the piece of sheet metal claimant was drilling was not needed or suitable as a clamp for the water hose on respondent's heater trucks. They further testified the piece of sheet metal was neither the proper length nor flexible enough to be used as a hose clamp.

In addition to the testimony of the claimant and the two representatives of the respondent, the preliminary hearing record contains exhibits which include the actual strip of sheet metal in question, a brace from the glider, and pictures of the water hose holder on the heater truck. The Appeals Board recognizes the evidence contained in the preliminary hearing record raises questions of whether the strip of sheet metal that claimant was drilling, at the time of the accident, could be utilized as a hose clamp. On the other hand, the Appeals Board also recognizes the preliminary hearing record raises questions as to whether the sheet metal strip could be utilized as a brace for claimant's glider.

At this stage of the proceeding, the Appeals Board concludes the greater weight of the credible evidence proves claimant was injured while he was drilling a sheet metal strip for the purpose of making a hose clamp for respondent's heater truck. The Appeals Board finds respondent has failed to present persuasive evidence to prove that claimant was injured while drilling a hole in a strip of sheet metal for his personal use of replacing a broken brace on his glider. Therefore, the Appeals Board finds the Order of the Administrative Law Judge finding that claimant's accidental injury arose out of and in the course of his employment should be affirmed.

(2) The Administrative Law Judge granted claimant's preliminary hearing request for medical compensation and temporary total disability compensation. On numerous previous occasions, the Appeals Board has found, at this juncture of the proceeding, it lacks jurisdiction to review issues related to medical compensation and temporary total disability compensation. See K.S.A. 44-534a(a)(2), as amended.

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes entered on August 12, 1997, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 1997.

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BOARD MEMBER

c: Michael L. Snider, Wichita, KS  
Vincent A. Burnett, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director